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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 687.

EDWARD T. ROEHNER,

Petitioner,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Question Presented.

Did the entry of judgment dismissing petitioner's complaint on the merits violate petitioner's rights under the due process clause of the 14th Amendment of the United States Constitution?

Statement of the Case.

Petitioner seeks review of the order of the Appellate Division First Department of the Supreme Court of the State of New York which unanimously affirmed: (a) the order of Special Term (Capozzoli, J.) of the Supreme Court of the State of New York entered in New York County denying petitioner's motion for summary judgment and granting respondent's motion for summary

judgment and (b) the judgment entered thereon dismissing petitioner's complaint on the merits.

Petitioner, as a member of respondent, The Association of the Bar of the City of New York, brought an action in the Supreme Court of the State of New York, New York county, in September, 1962, seeking to enjoin respondent from continuing to collect an increase in dues authorized by an amendment to respondent's constitution adopted at a stated meeting in March, 1957 (R. I, 9-11). The basis of petitioner's claim was that the members were deceived as to the need for the increase and induced to vote for it by false statements as to respondent's income and surplus. Issue was joined by respondent's answer in which respondent categorically denied the charges of fraud (R. 9-11).

Promptly thereafter respondent moved for summary judgment on affidavits of its Secretary (with attached copies of various records of respondent), its President from 1956 to 1958 (with attached copies of reports and minutes) and its Treasurer from 1956 to 1960 (R. 16-36), with copies attached to the former Treasurer's affidavit of the respondent's 1956-1957 budget and of the Lybrand, Ross Bros. & Montgomery report as to their examination of the respondent's "balance sheet and related statement of income, expenses and surplus of defendant [respondent] for the year ending April 30, 1956" and "the balance sheet and statement of income, expenses and surplus accompanying their report." On the basis of his own affidavit and four printed extracts from his periodical, *Editor & Publisher*, of which he is Editor-in-Chief, petitioner cross-moved for summary judgment for the injunction prayed for in the complaint (R. 37-75). Justice Aurelio in denying the cross-motion and granting summary judgment to respond-

ent (R. 81) found that petitioner's papers were "replete with many extraneous matters, which are completely irrelevant to the issues raised between the parties", and were "lacking in evidentiary facts which are necessary in order to defeat the motion of the defendant."

On appeal the Appellate Division unanimously affirmed without opinion, and both the Appellate Division and the New York Court of Appeals denied leave to appeal to the Court of Appeals (Appendices to Petition C, E and F).

Argument.

The petition does not in any way support petitioner's assertion (p. 11) that the Supreme Court, New York County—in defiance of the record and of the due process clause of the Fourteenth Amendment of the Constitution of the United States—granted respondent's motion for summary judgment; and, not content with that, has gravely injured petitioner's reputation as a lawyer by rebuking him for having brought baseless charges of fraud against respondent."

This litigation, which was commenced in September, 1962, had its genesis in 1957 primarily in a difference between petitioner and other members of respondent as to whether reserves for extraordinary repairs and contingencies totalling $140,191.75 should be treated as "surplus", and ultimately as to whether a dues increase was necessary. The notice to members of a stated meeting to be held on March 12, 1957 had had attached to it a summary of Income and Expenses for the years ending April 30, 1947, 1952 and 1957 (budget figures) which showed that as of May 1, 1956 no surplus had been accumulated

and that the budget (R. 25, footnote (a)) for the then current fiscal year showed a deficit of $5,000 (R. 20-25). As shown by the minutes of such stated meeting, at which the proposed amendment increasing dues was considered and adopted, petitioner stated his position as to surplus and income and his opposition to increasing dues (R. 28-30). The minutes also show that the respondent's then treasurer reviewed its income and expenses, particularly for the first ten months of the fiscal year 1956-57, and explained the basis of the figures which petitioner had questioned (R. 28-30). With the facts, and both sides of the argument, thus laid before them the members voted overwhelmingly for the dues increase (R. 31) and at least up to November 20, 1962, the records of the treasurer's office showed no protest to payment of the increased dues (R. 36).

It was thus upon the minutes of the above-mentioned March 1957 stated meeting and other unchallenged records kept by respondent in the regular course of business, and the complete lack of evidence to support petitioner's charges of fraud that Special Term denied petitioner's motion for summary judgment and granted judgment dismissing the complaint (R. 78-81).

Petitioner's charge that he was rebuked for having brought the action is not a ground for granting certiorari. We submit there is nothing in the record to sustain the charge. In the only opinion written, that of Justice Capozzoli, the court simply, and properly, found that the most that could be said of petitioner's position was that it presented "a difference of opinion as to how the accountants should have listed the items in question"; that such a difference would not sustain an action for fraud (R. 80); and that "conclusory allegations and unsupported charges do not take the place of evidentiary facts" (R. 81).

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: January 7, 1964.

Respectfully submitted,

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